FILED

02 1607 APR 30 2003

OFFICE OF THE CLERK

NO.

IN THE

Supreme Court of the United States

JOHN PETTIT, DISTRICT ATTORNEY OF WASHINGTON COUNTY, PENNSYLVANIA,
Petitioner,

v.

FREDERICK A. BRILLA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Anthony Cillo, Esquire
Counsel of Record
Cohen & Grigsby, P.C.
11 Stanwix Street
15th Floor
Pittsburgh, PA 15222
412-297-4900

29 pp

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in affirming the judgment entered against District Attorney Pettit on Plaintiff's Section 1983 claim for the District Attorney's alleged failure to return certain property seized from Plaintiff by the Pennsylvania State Police where District Attorney Pettit believed that the property at issue was not in his custody or control, but instead in the custody or control of the Attorney General of the Commonwealth of Pennsylvania?

II. Whether the Court of Appeals erred in affirming a punitive damages award against District Attorney Pettit by concluding that District Attorney Pettit acted with "indifference" with respect to the return of Mr. Brilla's property?

III. Whether the Court of Appeals, in direct contravention of the principles enunciated in this Court's decisions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Mutual Automobile Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003), and fundamental principles of due process, committed constitutional error by affirming a remitted punitive damages award that is 50,000 times the nominal damages awarded in this case where the conduct that allegedly supports the award of punitive damages did not impact or impair the health or safety of others and where that conduct was arguably the result of, at most, a mistake or accident?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner is John Pettit, District Attorney for Washington County, Pennsylvania. Respondent is Frederick A. Brilla.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

I. THE COURT OF APPEALS' DECISION IMPERMISSIBLY EXTENDS THE REACH OF SECTION 1983 BY IMPOSING LIABILITY FOR CONDUCT THAT DOES NOT RISE TO AT LEAST A LEVEL OF RECKLESSNESS 10

II. THE COURT OF APPEALS' IMPROPERLY APPLIED THE "CALLOUS INDIFFERENCE" STANDARD IN AFFIRMING THE AWARD OF PUNITIVE DAMAGES AND THEREBY DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT 14

III. THE *GORE* GUIDEPOSTS SHOULD BE USED TO EXAMINE THE EXCESSIVENESS OF PUNITIVE DAMAGES AWARDED IN A FEDERAL COURT ON A FEDERAL CLAIM 17

IV. THE COURT OF APPEALS AFFIRMANCE OF THE $50,000 REMITTED PUNITIVE DAMAGES AWARD CONFLICTS WITH *GORE* AND *STATE FARM*.....18

A. The Court of Appeals Failed To Properly Consider the Reprehensibility Guidepost in Contravention of *Gore* and *State Farm*.....18

B. The Extreme 50,000 to 1 Ratio Approved by the Court of Appeals Contravenes Due Process and is Contrary to *Gore* and *State Farm*.....20

C. The Punitive Damages Award Affirmed by the Court of Appeals Contravenes Due Process and is Contrary to *Gore* and *State Farm* Because That Award is More Than Three Times Higher Than Any Sanction That Could Be Imposed Under State Law.....21

CONCLUSION.....22

TABLE OF AUTHORITIES

Page

Cases

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) ..... passim

Carey v. Piphus, 435 U.S. 247 n. 11 (1978) 14

Carlson v. Green, 446 U.S. 14 (1980) 14

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 14

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) 18

Daniels v. Williams, 474 U.S. 327 (1986) 9, 10

Davidson v. Cannon, 474 U.S. 344, 347 (1986) 10

Fiorentino v. Rappoport, 693 A.2d 208 (Pa. Super. 1997) 13

Iacobucci v. Boulter, 193 F.3d 14 (1st Cir. 1999) 16

Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999) 15, 16

Lee v. Edwards, 101 F.3d 805, n.2 (2d Cir. 1996) 17

Perez v. Z Frank Oldsmobile, Inc., 223 F.3d 617 (7th Cir. 2000) 17

Smith v. Wade, 461 U.S. 30 (1983) 14, 15

State Farm Mutual Automobile Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003) ..... passim

Statutes and Constitutional Provisions

U.S. Const. amend. V 1

U.S. Const. amend. XIV, §1 1

18 Pa. C.S.A. §§ 1101, 3901, 3903 and 3921 22

18 Pa. C.S.A. §§ 3901, 3921 21

28 U.S.C. §1254(1). 1

28 U.S.C. §1331 6

28 U.S.C. §1343(a)(3) 6

28 U.S.C. §1343(a)(4) 6

42 Pa. C.S.A. §6801 ..... 2, 3

42 Pa. C.S.A. §6801(d) 3, 12, 13

42 Pa. C.S.A. §6801(e) 3, 12, 13

42. U.S.C. §1983 ..... passim

Rules

Fed. R. Civ. P. 50(a) 7

Petitioner John Pettit respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania (8a – 37a) has not been officially reported. The opinion of the Court of Appeals for the Third Circuit (1a – 5a) has not been officially reported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on January 30, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides in part that: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Due Process clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, §1

42. U.S.C. §1983 provides in part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or

> the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The provisions of 42 Pa. C.S.A. §6801 are reprinted in the separately filed Appendix (38a – 45a).

STATEMENT OF THE CASE

This Section 1983 action arose in the aftermath of an investigation by the Pennsylvania State Police that led to the arrest, conviction and incarceration of Respondent, Frederick A. Brilla ("Mr. Brilla"), for drug trafficking.

On September 13, 1999, the Pennsylvania State Police executed a search warrant at the residence of Mr. Brilla and seized certain property. Among other items, the Pennsylvania State Police seized cocaine, approximately $52,000 in cash, lawn and garden equipment, two motorcycles, a television and stereo system, a Tandy computer and various photographs. The larger items confiscated during the seizure, such as the lawnmowers, tractors, motorcycles, and television and stereo system, were taken by the State Police to a local storage facility known as "Aunt Minnies" where they were stored until 1996. As an accommodation to the Pennsylvania State Police, District Attorney Pettit agreed that his office would pay the rent for the storage facility leased from Aunt Minnies.

However, District Attorney Pettit's office did not have keys to that facility.

The property that was seized by the Pennsylvania State Police from Mr. Brilla's residence became the subject of a forfeiture action commenced pursuant to the Pennsylvania forfeiture statute, 42 Pa. C.S.A. §6801. That statute provides a detailed and comprehensive scheme for the seizure, custody and ultimate disposition of property subject to forfeiture, and it distinguishes between the rights and corresponding obligations of the Pennsylvania Attorney General, on the one hand, and local district attorneys, on the other hand. Simply stated, if the law enforcement agency that seized the property had statewide jurisdiction, then the property is ultimately forfeited to the Attorney General. Alternatively, if the law enforcement authority that seized the property had only local or county jurisdiction, then the local district attorney becomes the beneficiary of the forfeiture. 42 Pa. C.S.A. §6801(e). The ultimate beneficiary of the forfeiture is deemed by statute to be in custody of the property at issue prior to its forfeiture. 42 Pa. C.S.A. §6801(d).

The Pennsylvania State Police is a law enforcement agency with statewide jurisdiction. Consequently, the ultimate beneficiary of the forfeiture of Mr. Brilla's property would have been the Pennsylvania Attorney General. It was the Pennsylvania Attorney General's office therefore that commenced and prosecuted the forfeiture action. Neither District Attorney Pettit nor Washington County, Pennsylvania was a party in that proceeding. District Attorney Pettit's office had no financial interest in the outcome of the forfeiture proceeding because, if successful, that proceeding would have resulted in the forfeiture of Mr. Brilla's

property to the Commonwealth of Pennsylvania, not the County of Washington.

The Attorney General's forfeiture action was dismissed as untimely on February 7, 1995 while Mr. Brilla was still incarcerated.[1] The lawn and garden equipment that had been seized from Mr. Brilla was not owned by Mr. Brilla, but was instead leased by him from others. After the dismissal of the forfeiture action, the owners of the lawn and garden equipment filed a motion with the Court of Common Pleas of Washington County, Pennsylvania to recover their property. That motion was granted by the court on April 17, 1996. The owners of that property then took the Order to the Pennsylvania State Police which gave them back their property.

Shortly after the lawn and garden equipment was removed from Aunt Minnies and returned to its owners, District Attorney Pettit was advised by Aunt Minnies that the District Attorney's office was behind on the rent payments for the storage facility that was being used by the Pennsylvania State Police to house the larger items of property that had been seized from Mr. Brilla. District Attorney Pettit contacted the State Police and asked them if they could store the remaining items elsewhere. The State Police had no secure location for the remaining large items (i.e., the motorcycles, television and stereo system) and they asked District Attorney Pettit if he knew of a secure facility for that property. In response, District Attorney Pettit made arrangements for the State Police to store the motorcycles in the old Washington County

---

1 Mr. Brilla served four years and three months in a Pennsylvania state correctional institution and was released from prison in July 1996. He was also fined $100,000. Part of the money seized by the Pennsylvania State Police was ultimately applied to his fine.

Jail. The motorcycles were moved to the old County Jail by the State Police in November 1996. The television and stereo system were moved by the State Police to the District Attorney's Drug Task Force offices.

While still incarcerated, Mr. Brilla learned that the forfeiture action had been dismissed and that the owners of the lawn and garden equipment had successfully obtained the return of their property. Mr. Brilla then wrote to the Court of Common Pleas of Washington County seeking the return of his property. That letter caused the court to issue an Order in the forfeiture proceeding dated April 25, 1996 providing in part that "the remaining personalty which belongs to claimant, Fred Brilla, be returned to him within ninety (90) days of this date." There is no evidence that the court's Order was ever served on the State Police, the law enforcement agency that had seized Mr. Brilla's property, or the Pennsylvania Attorney General, the prosecutor and potential beneficiary of the forfeiture action.

After obtaining the April 25, 1996 Order, Mr. Brilla asked his father ("Mr. Brilla, Sr.") to attempt to retrieve some of the property that had been the subject of the Attorney General's forfeiture action. Mr. Brilla, Sr. attempted to communicate with District Attorney Pettit, but was unsuccessful. Mr. Brilla then decided to wait until he was released from prison to attempt to retrieve his property.

After Mr. Brilla's release from prison in July 1996, he visited District Attorney Pettit's office in an effort to speak with the District Attorney about the return of his property. Although Mr. Brilla did not speak then with District Attorney Pettit, Mr. Brilla claims to have left a copy of the Court's April 25, 1996 Order with the District Attorney's secretary.

There is no evidence of any further efforts on the part of Mr. Brilla to retrieve his property until early 1998.

On February 17, 1998, Mr. Brilla served the District Attorney's office with a Petition he had prepared to enforce the April 25, 1996 Order issued by the Court of Common Pleas of Washington County. That Petition bore the caption of the forfeiture proceeding and was presented to the Court on February 20, 1998. Although the forfeiture proceeding had not been prosecuted by the District Attorney's office, a member of the District Attorney's office attended the presentation of that Petition after being asked to do so by the court. Mr. Brilla did not serve the State Police or the Attorney General's office with a copy of his Petition.

Mr. Brilla's Petition to enforce the court's April 25, 1996 Order was denied on March 31, 1998. On that date, the Washington County Court of Common Pleas issued an Order which provided in part that "upon consideration of Frederick A. Brilla's Petition to Enforce Order, same is DENIED as the Commonwealth has substantially complied." Mr. Brilla subsequently filed a motion for reconsideration, but the Court of Common Pleas of Washington County never ruled on that motion.

In June 1988, Mr. Brilla filed his complaint in this action against District Attorney Pettit and other members of his office for an alleged civil rights violation and for negligence. Mr. Brilla claimed that each of the defendants violated his civil rights by failing to return the personal property that was seized by the Pennsylvania State Police during the execution of the search warrant at his residence. Jurisdiction was premised on 28 U.S.C. §1331 and 1343(a)(3) and (4).

While this action was pending, Mr. Brilla met with District Attorney Pettit to discuss the return of his property. After speaking with Mr. Brilla, District Attorney Pettit contacted the State Police for permission to return the motorcycles, television and stereo system to Mr. Brilla. Permission was granted and those items were returned to Mr. Brilla on July 11, 2000.[2]

This case was tried to a jury on June 6 – 13, 2001 against District Attorney Pettit and another member of the District Attorney's office ("Mr. Fagella"). Mr. Fagella was dismissed from the case pursuant to Fed. R. Civ. P. 50(a) following the close of Mr. Brilla's case.

After the close of all of the evidence, District Attorney Pettit moved for judgment as a matter of law on each of Mr. Brilla's claims. The Court entered judgment in favor of District Attorney Pettit on Mr. Brilla's state law negligence claim, but denied District Attorney Pettit's other motions. Thus, when the case was presented to the jury, District Attorney Pettit was the only Defendant and the only remaining claim against him was Mr. Brilla's Section 1983 claim for compensatory and punitive damages.

On June 13, 2001, the jury entered a verdict in favor of Mr. Brilla. However, there was no award of compensatory damages. Instead, Mr. Brilla was awarded nominal damages in the amount of $1 and

---

[2] Mr. Brilla did not recover the Tandy Computer or photographs seized by the State Police. There is no evidence that Mr. Brilla's Tandy Computer or his photographs were ever stored by the State Police at Aunt Minnies or provided by the State Police to District Attorney Pettit's office.

punitive damages in the amount of $100,000. Judgment was subsequently entered by the District Court on June 18, 2001.

District Attorney Pettit filed a timely post-trial motion seeking judgment as a matter of law, a new trial or a remitter of the punitive damages award. Mr. Brilla filed a motion for costs and attorneys fees.

On March 21, 2002, the district court entered a Memorandum Order (1) denying District Attorney Pettit's motion for judgment as a matter of law and/or new trial, (2) remitting the punitive damages award to $50,000, and (3) awarding Mr. Brilla attorneys fees and costs in the total amount of $15,665.48. (8a – 37a). The remittur was subsequently accepted by Mr. Brilla and District Attorney Pettit appealed.

On January 30, 2003, the Court of Appeals for the Third Circuit entered its Judgment and a separate opinion affirming the district court. The Court of Appeals concluded that (1) there was sufficient evidence to sustain the jury's findings of a Section 1983 violation, (2) an award of punitive damages was justified because the evidence supported a finding of "indifference" on the part of District Attorney Pettit, and (3) the district court did not err by failing to further reduce the punitive damages award. (1a – 5a).

REASONS FOR GRANTING THE WRIT

This case presents several important questions concerning the scope and extent of liability of prosecutors for the untimely return of property seized by law enforcement agencies pursuant to a valid search warrant. First, if the Court of Appeals correctly concluded that District

Attorney Pettit's conduct amounted to more than negligence, then this case presents an issue left unresolved in the Court's decision in *Daniels v. Williams*, 474 U.S. 327 (1986). In *Daniels*, the court declined to state the level of culpability beyond negligence that is necessary to give rise to Section 1983 liability for deprivations of due process. It is respectfully submitted that as a result of the court of appeals' decision the Court should decide whether a defendant's conduct must rise to the level of at least recklessness in order for there to be a due process violation and corresponding liability under §1983.

This case also presents the corollary question, not yet settled by this Court, of whether every Section 1983 violation for a deprivation of due process can support an award of punitive damages. If the court of appeals properly applied the "callous indifference" standard for an award of punitive damages under Section 1983, then every Section 1983 violation for a deprivation of due process will potentially support a punitive damages award. That result, however, arguably conflicts with previous pronouncements of this Court

Finally, the case presents the issues of whether the guideposts of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), as reiterated and applied in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003), are applicable to a review of punitive damages awarded in federal court on federal claims, an issue on which there is not unanimity among the circuits, and whether those guideposts, if applicable, were properly applied in this case where the remitted punitive damages award is 50,000 times the nominal damages awarded and the alleged constitutionally offensive conduct did not impact or impair the health or safety of others.

District Attorney Pettit submits that the $50,000 punitive damages award affirmed by the court of appeals is beyond the legitimate scope of punishment and deference and grossly excessive as a matter of due process. For this reason and those set forth above, District Attorney Pettit respectfully submits that this Court should grant certiorari.

I. THE COURT OF APPEALS' DECISION IMPERMISSIBLY EXTENDS THE REACH OF SECTION 1983 BY IMPOSING LIABILITY FOR CONDUCT THAT DOES NOT RISE TO AT LEAST A LEVEL OF RECKLESSNESS

The Court has made it clear that negligent conduct does not give rise to §1983 liability for resulting unintended loss of or injury to life, liberty or property. *Davidson v. Cannon*, 474 U.S. 344, 347 (1986); *Daniels v. Williams*, 474 U.S. 327, 328 (1986). Neither the *Davidson* nor the *Daniels* decision, however, articulated the precise level of culpability necessary to give rise to §1983 liability for a deprivation of due process rights. In fact, that question was specifically left unanswered in *Daniels*. 474 U.S. at 334 n.3 ("this case affords us no occasion to consider whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process clause").

The court of appeals concluded that there was sufficient evidence of culpability to support a finding of §1983 liability for a deprivation of due process for several reasons. First, the court of appeals determined that District Attorney Pettit "personally paid storage fees for almost seven years,

totaling $8,000."[3] (3a). Secondly, the court of appeals concluded that District Attorney Pettit was the "stakeholder" of Mr. Brilla's property. (Id.). Finally, the court of appeals concluded that the District Attorney's office was aware of the Order issued by the Court of Common Pleas of Washington County on April 25, 1996 directing the return of Mr. Brilla's property, as well as other orders issued in the forfeiture proceeding, and that District Attorney Pettit was therefore obligated to comply with that Order. (Id.).

The court of appeals' emphasis on the receipt by District Attorney Pettit's office of Orders issued by the Court of Common Pleas of Washington County in the Attorney General's forfeiture proceeding was misplaced. First, the April 25, 1996 order made its way to Attorney Pettit's office through mere happenstance as the District Attorney's office was not a party to that proceeding. The court's order was incorrectly captioned as a criminal matter and orders in all criminal matters are routinely routed to the District Attorney's office. The forfeiture proceeding, however, was a civil proceeding. Consequently, if the court's April 25, 1996 order had been properly captioned, it would not have been routed to District Attorney Pettit's office. Secondly, whether the District Attorney's office knew of the April 25, 1996 Order is irrelevant. The Order was not directed to District Attorney Pettit. Moreover, even if it had been, as a matter of Pennsylvania law Mr. Brilla's property was deemed to be in the custody and control of the Pennsylvania

---

[3] By this, the court of appeals must have meant that District Attorney Pettit personally signed the rent checks issued by the District Attorney's office to Aunt Minnies as it is clear from the record that rent for the storage facility used by the Pennsylvania State Police was paid with funds from the District Attorney's office, not with District Attorney Pettit's personal funds. (Trial Transcript, p. 388).

Attorney General, 42 Pa. C.S.A. §6801(d), and District Attorney Pettit was therefore powerless to return that property.

When considered in the light of the applicable Pennsylvania law, it is apparent that the court of appeals erred in determining that District Attorney Pettit's conduct was sufficiently culpable to support a §1983 violation for a deprivation of due process. Pursuant to the Pennsylvania forfeiture statute, the Pennsylvania Attorney General was the "stakeholder" of Mr. Brilla's property, not District Attorney Pettit, since it was the Pennsylvania State Police that seized Mr. Brilla's property and it was the Pennsylvania Attorney General who would have been the beneficiary of that seizure. 42 Pa. C.S.A. §6801(e). Moreover, as the "stakeholder" the Pennsylvania Attorney General was deemed by statute to have custody of Mr. Brilla's property, not District Attorney Pettit. 42 Pa. C.S.A. §6801(d). It follows, then, that only the Pennsylvania Attorney General (or the Pennsylvania State Police acting on his behalf) had the obligation and power to return Mr. Brilla's property. Indeed, that was District Attorney Pettit's understanding of the duties and obligations of the Pennsylvania Attorney General's office with respect to the property that had been seized by the Pennsylvania State Police.

District Attorney Pettit and others acted consistent with District Attorney Pettit's belief that Mr. Brilla's property was in the custody and control of the Pennsylvania State Police. For example, after the Court of Common Pleas of Washington County ordered the return of the lawn and garden equipment to the owners of that equipment, those owners obtained their property by presenting the court's Order to the Pennsylvania State Police, not District Attorney Pettit. Similarly, before returning Mr. Brilla's property, District Attorney Pettit sought

and received permission from the Pennsylvania State Police to return that property.

Although the Court of Appeals did not address 42 Pa. C.S.A. §6801(d) and (e) in its opinion, it must have concluded that District Attorney Pettit was incorrect in his belief that under Pennsylvania law Mr. Brilla's property was in the custody and control of the Pennsylvania Attorney General's office and that it was that office that had the power, obligation and duty to return Mr. Brilla's property. That must have been the reason that the court of appeals described District Attorney Pettit as the "stakeholder" and the one with the obligation to return Mr. Brilla's property. Assuming that the court of appeals' construction of the Pennsylvania forfeiture statute was correct, District Attorney Pettit's different understanding of that statute and the responsibilities of his office and the Pennsylvania Attorney General's office regarding seized property, does not rise to the level of recklessness.[4] Thus, arguably, the §1983 liability imposed on District Attorney Pettit can only be sustained if conduct short of recklessness is sufficient to make out a claim for a due process violation. It is respectfully submitted that this Court should decide that important issue.

---

[4] Typically, the failure of an attorney to know principles of law is regarded by Pennsylvania courts as negligence, not recklessness. *Fiorentino v. Rappoport*, 693 A.2d 208, 213 (Pa. Super. 1997).

II. THE COURT OF APPEALS' IMPROPERLY APPLIED THE "CALLOUS INDIFFERENCE" STANDARD IN AFFIRMING THE AWARD OF PUNITIVE DAMAGES AND THEREBY DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

The Court has determined that a jury may award punitive damages in an action under §1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). Moreover, the recklessness standard for punitive damages applies even where the underlying standard for liability for compensatory damages is one of recklessness. *Id.*

The Court's holding in *Smith v. Wade* does not mean that every plaintiff that proves a §1983 violation through a showing of recklessness on the part of the defendant is also entitled to seek punitive damages. Indeed, this Court has long cautioned that punitive damages should only be awarded in a "proper case" under §1983 in order to deter or punish violations of constitutional rights. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267-68 (1981); *Carlson v. Green*, 446 U.S. 14, 22 (1980); *Carey v. Piphus*, 435 U.S. 247 n. 11 (1978). Moreover, the Court has intimated that in some §1983 cases the potential for an attorneys' fee award to a prevailing plaintiff is enough to ensure that agents of the State will not deliberately ignore due process rights. *Carey*, 435 U.S. 247 n. 11.

The court of appeals misapplied *Smith v. Wade* by assuming that the same allegedly reckless conduct that supports §1983 liability in the first place necessarily supports an award of punitive

damages. However, the state of mind required to make out a cognizable § 1983 claim differs materially from that required to justify punitive damages. *See Kolstad v. American Dental Ass'n*, 527 U.S. 526, 536 (1999).

In *Kolstad*, the Court confirmed that the *Smith v. Wade* standard for punitive damages requires a different form of recklessness than that required to justify liability in the first place. Punitive damages become a discretionary matter for the jury in a §1983 case only if the plaintiff makes an adequate threshold showing of at least "reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. at 56. The special showing of recklessness needed to trigger eligibility for punitive damages pertains to the defendant's subjective knowledge that he or she may be acting in violation of federal law. Stated differently, this subjective standard of recklessness requires proof that the defendant acted "in the face of a perceived risk that [his or her] actions [would] violate federal law." *Kolstad*, 527 U.S. at 536.

The important distinction between the state of mind necessary to prove a §1983 violation for a deprivation of constitutional rights, and the state of mind required to justify punitive damages has been described by one court as follows:

> The state of mind required to make out a cognizable section 1983 claim . . . differs importantly from that required to justify punitive damages. The former requirement relates only to the conduct, not to the consequence; that is, it entails an intent to do the act, not to effect a civil rights violation.

Iacobucci v. Boulter, 193 F.3d 14, 26 (1st Cir. 1999) (citations to *Kolstad* omitted). Thus, to justify punitive damages, a plaintiff must do more than show that the defendant's conduct was reckless. It must also be shown that the defendant perceived a risk that his or her actions would violate federal law.

No such showing was made in this case. Instead, the Court of Appeals concluded that the jury could infer "indifference" based on the following:

> In addition to paying storage costs, Pettit personally directed the property's transfer from the state police storage facility to the county jail and his own Drug Task Force office. The jury could certainly infer from Pettit's involvement – as an attorney, no less – that he should have known that a forfeiture proceeding could never take 11 years to come to fruition, and that at some point he should have questioned whether he was properly continuing to be the "stakeholder" of Brilla's property. His indifference to the issue of whether he was justified in keeping such property gave rise to the award of punitive damages.

(3a). Although the facts recital by the court may have barely been enough for the jury to infer that District Attorney Pettit was negligent with respect to Mr. Brilla's property, it does not support an inference that District Attorney Pettit acted in the face of a perceived risk that he might be violating federal law.

It is respectfully submitted that this Court should issue a writ of certiorari in this case in order to make it clear that not every §1983 violation premised on a due process deprivation entitles a plaintiff to punitive damages, and to more clearly distinguish between the type of culpability required to prove a due process deprivation and that required for punitive damages.

III. THE *GORE* GUIDEPOSTS SHOULD BE USED TO EXAMINE THE EXCESSIVENESS OF PUNITIVE DAMAGES AWARDED IN A FEDERAL COURT ON A FEDERAL CLAIM

There is not unanimity among the circuits as to whether the guideposts enunciated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), must be applied as a matter of constitutional law in measuring the excessiveness of punitive damages awarded in a federal court on a federal claim. The Court of Appeals for the Second Circuit has determined that the *Gore* guideposts should be so applied. *Lee v. Edwards*, 101 F.3d 805, 809 n.2 (2d Cir. 1996) ("Although *Gore* examined the excessiveness of punitive damages awarded in a state court, the universal premise of the Supreme Court's due process reasoning suggests that the same considerations apply equally to the review of punitive damages in federal court." (citation omitted)). The Court of Appeals for the Seventh Circuit has concluded otherwise. *Perez v. Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 625 (7th Cir. 2000) ("when a plaintiff seeks punitive damages in a federal case, it is unnecessary to look for limits in the Constitution.").

This Court should determine whether the Due Process Clause of the Fifth Amendment of the United States Constitution imposes limitations on punitive damages awarded in federal courts on

federal claims, just as the Due Process Clause of the Fourteenth Amendment of the United States Constitution imposes such limitations on punitive awards in state courts. In other words, defendants in federal court on federal claims should be provided with the same due process protections as defendants in state court actions. An extension of the protections offered by the *Gore* guideposts to federal claims would accomplish that result.

IV. THE COURT OF APPEALS' AFFIRMANCE OF THE $50,000 REMITTED PUNITIVE DAMAGES AWARD CONFLICTS WITH *GORE* AND *STATE FARM*

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the court reiterated the importance of the three *Gore* guideposts by mandating that appellate courts conduct a *de novo* review of a trial court's application of them to a jury's award. *Id.*, at 424. The court of appeals' decision fundamentally misapplies the three guideposts identified by this Court in *Gore* and *State Farm* for determining whether a punitive damages award is unconstitutionally excessive. The court of appeals interpretation of the three guideposts removes all meaningful constraints on the size of punitive awards in due process cases not involving a reckless disregard of the health or safety of others.

A. The Court of Appeals Failed To Properly Consider the Reprehensibility Guidepost in Contravention of *Gore* and *State Farm*

"The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 575. As a result, the Court has instructed courts to determine the

reprehensibility of a defendant's conduct by considering whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm, 123 S. Ct. 1521 (citing *Gore*, 517 U.S. at 576-77). While the existence of any one of these factors does not automatically sustain a punitive damages award, "the absence of all of them renders any award suspect." *State Farm*, 123 S. Ct. at 1521.

In this case none of the reprehensibility factors required to sustain a punitive damages award is present. The harm, if any, caused by District Attorney Pettit's conduct was economic, not physical. The District Attorney's conduct did not impact or impair the health or safety of others. There was no evidence that Mr. Brilla had "financial vulnerability." The district court found that District Attorney Pettit's conduct was an isolated incident. (18a). The harm, if any, experienced by Mr. Brilla was derived from conduct more appropriately characterized as accidental than malicious or deceitful. Thus, the award of any punitive damages should have been suspect. Instead, the Court of Appeals affirmed a $50,000 punitives award.

The failure of the Court of Appeals to properly apply the reprehensibility factors is by

itself a sufficient basis for this Court to grant the requested writ of certiorari.

B. The Extreme 50,000 to 1 Ratio Approved by the Court of Appeals Contravenes Due Process and is Contrary to *Gore* and *State Farm*

There is no brightline ratio which a punitive damages award cannot exceed and the Court again recently declined the opportunity to impose such a benchmark. *State Farm*, 123 S. Ct. at 1524. However, the court noted in *State Farm* that "[o]ur jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.*

Although *State Farm* was decided in the context of a $145 million punitive award on top of a $1 million compensatory award, the court nevertheless noted that similar limitations apply in cases involving little to no compensatory damages. As observed by the Court, "because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of damages.'" *State Farm*, 123 S. Ct. at 1524 (noting that *Gore* posited that a higher ratio *might* be necessary where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine").

When measured by the reprehensibility factors of *Gore*, this case does not involve "a particularly egregious act." Liability was imposed on District Attorney Pettit not because he acted

maliciously or with ill will towards Mr. Brilla, but instead because the jury ultimately concluded that District Attorney Pettit improperly administered seized property.

Moreover, this was not a case where it would have been difficult to determine the extent of Mr. Brilla's economic harm. Market values could have been established for each piece of property at issue and the jury might properly have been permitted to award that amount as damages given the length of time it took Mr. Brilla to recover his property.[5]

Given the criteria of the second *Gore* guidepost, the $50,000 punitive award in this case (a 50,000 to 1 ratio) is plainly excessive.

C. The Punitive Damages Award Affirmed by the Court of Appeals is Contrary to *Gore* and *State Farm* and Therefore Contravenes Due Process Because That Award is More Than Three Times Higher Than Any Sanction That Could Be Imposed Under State Law

The third guidepost set forth in *Gore* is the disparity between the punitive damages owed and the "civil penalties authorized or imposed in comparable cases." *State Farm*, 123 S. Ct. at 1526. Research has not disclosed the imposition of civil penalties under Pennsylvania law for conduct comparable to that at issue in this case. Under Pennsylvania law criminal penalties in the form of

---

[5] The district court concluded that damages would have been difficult to calculate in part because some of the seized items, most notably Mr. Brilla's photographs, were not returned and that no value could be placed on such items. However, as noted previously, there was no evidence that the photographs were ever provided to District Attorney Pettit.

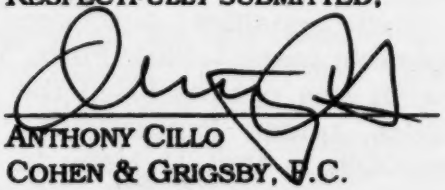
fines may be imposed on one who intentionally deprives another of his or her property for an extended period of time. 18 Pa. C.S.A. §§ 3901, 3921. The possible fines for such conduct range from $2,500 to $15,000, depending on the nature and value of the property at issue. See 18 Pa. C.S.A. §§ 1101, 3901, 3903 and 3921.

Although the Court has cautioned against the use of criminal fines when determining the appropriate dollar amount of a punitive damages award, see *State Farm*, 123 S. Ct. at 1526, it is nevertheless instructive that the punitive damages award affirmed by the court of appeals in this case on the basis of alleged "indifference" is at least three times the criminal fine that could be imposed under Pennsylvania law for comparable *intentional* conduct.

CONCLUSION

It is respectfully submitted that this Honorable Court should issue the requested writ of certiorari in order to prevent a palpable miscarriage of justice and to address the important questions described above.

RESPECTFULLY SUBMITTED,



ANTHONY CILLO
COHEN & GRIGSBY, P.C.
11 STANWIX STREET
15TH FLOOR
PITTSBURGH, PA 15222
412-297-4900

Dated: April 30, 2003
730603